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NATIONAL ASSOCIATION OF THE DEAF

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October 15, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Dkt. No. 95-176

Dear Mr. Caton:

Enclosed please find an original and eleven copies of a Request for Reconsideration of certain rules released in the above titled proceeding on August 22, 1997. This Request is submitted on behalf of the National Association of the Deaf and the Consumer Action Network.

I would appreciate your referring all correspondence regarding this matter to my attention.

Sincerely,

Karen Peltz Strauss

Karen Peltz Strauss
Legal Counsel for Telecommunications Policy

cc: Meryl Icove, Cable Services Bureau

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Closed Captioning and Video	)	
Description of Video Programming	)	
	)	MM Docket No. 95 -176
Implementation of Section 305 of the	)	
Telecommunications Act of 1996	)	
	)	
Video Programming Accessibility	)	

REQUEST FOR RECONSIDERATION OF THE CAPTIONING MANDATES

NATIONAL ASSOCIATION OF THE DEAF
CONSUMER ACTION NETWORK

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October 15, 1997

Before the
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REQUEST FOR RECONSIDERATION BY THE NATIONAL ASSOCIATION OF THE DEAF AND THE CONSUMER ACTION NETWORK

I. Introduction

The National Association of the Deaf (NAD) and the Consumer Action Network (CAN), collectively referred to as the "NAD et. al.," hereby submit this Request for Reconsideration of rules issued in the above captioned proceeding. The NAD is the nation's largest organization safeguarding the accessibility and civil rights of 28 million deaf and hard of hearing Americans. CAN is a coalition of national organizations of, by, and for deaf and hard of hearing people, that also seeks to protect and expand the rights of deaf and hard of hearing persons.[1] NAD and CAN work to ensure equal access to education, employment, telecommunications, technology, health care, and community life. Both the NAD and CAN have been active participants in this FCC docket, having submitted extensive comments and reply comments on the FCC's Notice of

[1] See Attachment A for a listing of CAN membership organizations.

Inquiry, released December 4, 1995 (NOI), and the Notice of Proposed Rulemaking, released January 17, 1997 (NPRM), in this proceeding.

On August 22, 1997, the Federal Communications Commission (FCC or Commission) released its final Report and Order in this proceeding setting forth requirements for video providers and owners to provide closed captioning for video programming, pursuant to Section 305 of the Telecommunications Act of 1996 (the 1996 Act), codified as Section 713.[2] The Commission's decision to exempt short advertisements, late night programming, and foreign language programming from its captioning mandates is unsupported by the language and legislative history of Section 713. As shown below, the factors considered in granting these exemptions, as well as the five percent "*de minimis*" exemption, and the FCC's decision to indefinitely permit the use of electronic newsroom reporting, are beyond the authority granted to the FCC by Congress in the 1996 Act. In addition, the NAD et. al. seeks reconsideration of the FCC's decision not to set benchmarks for pre-rule programming compliance, the final rule's procedures for handling undue burden exemption requests, and its procedures for achieving compliance with the captioning rules. These procedures saddle consumers with the onerous task of monitoring compliance with the FCC's captioning mandates, yet afford little protection for consumers against providers seeking broad exemptions from these rules.

II. The FCC Lacks Authority to Grant a Five Percent *De Minimis* Exemption

The FCC has stated that its goal is to ensure that "all new video programming [will be] fully accessible as soon as possible." R&O ¶41. Notwithstanding this goal, the Commission has

[2] *In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, FCC 97-279, MM Dkt. No. 95-176 (August 22, 1997) (R&O).

ruled that at no time in the future will video programming providers and owners be required to ensure that 100 percent of their new programming is accessible through captions (less the exemptions permitted under Section 713(d)). Specifically, the Commission has created, in response to the requests of certain video programming distributors, a "*de minimis*" exemption of five percent of all video programming. 47 C.F.R.§79.1(b)(1)(iv). The Commission's explanation for this exemption is that at times, difficulties "might unintentionally result in video programming providers being unable to provide such new programming with captions." R&O ¶43. The exemption, the Commission has concluded, is designed to reduce the burden on distributors receiving shows without captions shortly before air times and to "accommodate occasional technical lapses" that occur beyond a distributor's control. Id.

Put simply, the Commission lacks authority to grant a blanket five percent exemption for all video programming. Had Congress intended to legislate an exemption of this type, it could have and would have done so.[3] Instead, however, Section 713's language covering allowable exemptions is plain and unequivocal; exemptions must be limited to three situations: 1) where the captioning mandates are economically burdensome, 2) where the captioning mandates are inconsistent with contractual obligations, and 3) where the captioning mandates can impose an undue burden. 47 U.S.C.§713(d).

The Commission suggests that the five percent allowance is permissible because Congress only expected "that most new programming will be closed captioned." R&O ¶43, citing to H.

[3] Illustrative of this point is the fact that Congress did create a *de minimis* exemption elsewhere in the 1996 Act. Specifically, Congress authorized the Commission to exempt carriers from making contributions to universal service mechanisms, "if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis." 47 U.S.C.§254(d). No similar language appears in the captioning provisions of the 1996 Act.

Rep. No. 204, 104th Cong., 1st Sess. 114 (1995). Indeed, the Commission points to this language to conclude that Congress understood "that something less than all new programming would be captioned." Id. In fact, Congress did understand that "something less than all new programming" would be captioned. The specific language of Section 713(d) will result in numerous exemptions from the captioning mandates. An additional five percent allowance is not necessary to achieve this result. Similarly, the Commission's suggestion that even with the five percent allowance, its new rules will, nevertheless "represent a significant increase in the amount and variety of captioned programming available to viewers with hearing disabilities," R&O ¶47, ignores the plain language of the statute requiring *full* access to video programming; the statute does not merely direct that "a significant increase" in captioning take place.

In its Report and Order, the FCC states that some parties raised the concern that the need for last minute exemptions "could arise quite frequently," and that the FCC could be "overwhelmed with individual exemption requests," were it not to permit a *de minimis* exemption. R&O ¶36. Thus, much of the push for a *de minimis* exemption seems based on the assertion that production schedules may run late, and allow insufficient time for captioning. However, for several reasons, the arguments presented by these parties can not provide sufficient basis to grant a five percent, across-the-board, allowance for all programming.

First, it is important to note that although not desirable, captioning agencies are very accustomed to last minute requests for captions, and have devised effective means of handling short turn around schedules, by, for example, dividing up a program among many captioners. Many programs arrive at the captioners' desks at the eleventh hour, and are nevertheless exhibited with captions on television. More importantly, however, frequent last minute exemption requests

should raise a red flag demonstrating noncompliance to the Commission. Repeated requests of this nature signal the need to make significant adjustments in production schedules to accommodate the incorporation of captions. The FCC itself has stated that "closed captioning must become an integral part of the production of new programming," and that programming providers need "to incorporate captioning at the outset of the production process." R&O ¶17. Certainly the failure to leave sufficient time for captioning during this production process violates this overall objective, as well as the intent of Congress. Indeed, it is highly unlikely that the FCC would tolerate repeated last minute requests to eliminate the audio content of so much television programming.

Even were the FCC within its authority to grant a *de minimis* exemption, however, a five percent exemption of all new video programming can hardly be defined as *de minimis.*[4] A provider required to caption 7300 hours of programming a year (based on the Commission's decision to require 20 hours of programming per day x 365 days) would be permitted to eliminate captioning from as much as one hour of programming each and every day, or over 90 hours of programming per quarter, were the Commission's rule to stand. Arguably, this would permit the provider to exclude captioning for an entire one hour daily time slot, above and beyond the exemptions permitted elsewhere in the Commission's Order. Indeed, the final rule does not hold providers accountable to the FCC for the failure to caption programming that falls within this five percent allowance. As written, then, the new rule could permit providers to pick and choose certain programs that will not be captioned; yet the provider would still be deemed in compliance

[4] Black's Law Dictionary defines *de minimis* as "very small or trifling." Black's Law Dictionary, 6th Ed. (Minn. 1990) at 431. A truly *de minimis* exemption for the occasional difficulty or technical lapse might be .05%, rather than 5% of all new programming.

with the rules (so long as ninety-five percent of its remaining non-exempt programs was captioned).[5] At the same time, consumers would be powerless to challenge the failure to caption such shows, as the line between what must be captioned and what falls into this five percent allowance would be blurred. Certainly, such a result is inconsistent with Congressional intent.[6]

Rather, the occasional slip in compliance should be just that - *occasional* - and should be handled in a manner that is far less sweeping than the approach adopted in the current rule. One solution would be to permit a video provider to transmit the occasional program that could not be captioned due to unforeseen circumstances without captions, so long as the distributor of such program filed a statement with the FCC briefly explaining the difficulties that had resulted in noncompliance.[7] In this manner, several goals could be accomplished. First, video programming providers would have the incentive to caption all programs required by the new rules, and thereby further Congressional intent to achieve full captioning access. Second, providers would not need to pull programs from their program line-ups because of occasional and unforeseen technical lapses. Third, providers would remain accountable for their failure to caption a given program. With this approach, the Commission would be able to detect – and not tolerate -- patterns of noncompliance. Finally, because the statements by providers would be on record, consumer complaints regarding this programming could be handled effectively and expeditiously, as the FCC would have ready access to information about the failure to caption such programming.

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[5] With this leeway, providers could even offer their "one hour captioning-free" slot as an attraction for suppliers seeking networks for their shows. This is hardly what the Commission or Congress could have intended, yet seemingly permissive under the current rules.

[6] For the same reason, a 95% captioning requirement would make monitoring compliance exceedingly burdensome, if not impossible, for both consumers and the FCC, as there would be no controls over which programs must be captioned at any given time.

[7] Such statement could be filed within a short time - e.g., seven days - after the program was exhibited.

III. Categorical Exemptions Must be Based on Economic Burden

The Commission states that its "exemptions should be limited to only those situations where captioning is truly an economic burden," so that "the exemption process does not undermine the broad goals of Section 713." R&O ¶143. As shown below, however, the Commission's exemptions for short advertisements, late night programming, and Spanish language programming go beyond this limitation, and should be reversed.

A. Short Advertisements Should not be Exempted from the Commission's Mandates

The FCC has concluded that advertisements of under five minutes duration are not within the definition of programming under Section 713, and that, therefore, these advertisements need not be captioned. 47 C.F.R.§79.1(a)(1). But the Commission's decision to exempt this form of programming is unsupported by the plain language of the 1996 Act or its legislative history.[8]

Congress was explicit in its intent to limit categorical exemptions to those based on economic burden. 47 U.S.C. §713(d)(1). For example, the House Committee made clear that "[a]ny exemption should be granted using the information collected during the inquiry, and should be based on a finding that the provision of closed captioning would be economically burdensome to the provider or owner of such programs." H. Rep. No. 204 at 114 (1995) (emphasis added); see also Conf. Rep. No. 458, 104th Cong., 2d. Sess. (1996). Advertisements for nationally broadcast programs cost thousands, and on occasion, millions of dollars. In marked contrast, the cost of captioning short advertisements rarely exceeds $200. Certainly, then, an exemption for advertisements could not be based on economic burden.

[8] Although the Commission's Report and Order asserts that the "statute did not provide for captions 'on all televised material,'" the Commission has not cited any support for this statement. R&O ¶152.

Indeed, the FCC's primary justification for excluding advertisements from its captioning mandates does not seem to rest on the economic burden such captioning would impose. Rather, the primary reason for excluding this category of programming seems to stem from the FCC's assertion that "[a]dvertising is generally regarded as ancillary to the main programming content which is the focus of Section 713." R&O ¶152. The problem with this statement – aside from the fact that it is wholly unsupported by the statute – is that it ignores the important role which the federal government has historically placed on consumer advertising. Indeed, the Communications Act itself requires the Commission to direct cable operators to carry the entirety of a television station's program schedule on their cable systems. 47 U.S.C. §614(b)(3)(B) (emphasis added). This requirement extends to advertisements as well as programming, and recognizes the importance of passing through all such commercial information to consumers.

The Supreme Court has addressed the issue of ensuring consumer access to advertisements as well. In one case, in which the Court struck down a Virginia prohibition against advertisements on the prices of prescription drugs, the Justices explained:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

VA Pharmacy Board v. VA Consumer Council, 425 U.S. 748, 765; See also 44 Liquormart, Inc. v. Rhode Island, 134 L. Ed. 2d. 711, 723-24 (1996) (advertising ban on the price of alcoholic beverages held invalid). In a similar case, the Court struck down a Florida ban against advertising by certified public accountants because the law had "threaten[ed] societal interests in

broad access to complete and accurate commercial information." Edenfeld v. Fane, 123 L. Ed. 2d. 543, 552. There, the Court concluded that [t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." Id. at 552. In yet another case, Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, the Court proclaimed that "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." 447 U.S. at 561-62 (rejecting a ban on promotional advertising by electric utilities).

Each of above cases involved challenges to laws that would have hindered the right of consumers to receive information contained in advertisements. In each, the Supreme Court recognized the critical need to provide consumers with comprehensive access to commercial information for informed decisionmaking. It does not appear that the FCC considered these many benefits of advertising in making the decision to exempt this type of programming in its entirely from the captioning mandates.[9]

Similarly, the importance of political advertising cannot be overstated. That Congress has recognized the value of political advertising is reflected in the federal requirement that broadcasters offer reduced rates for such advertising during the forty five days prior to the date of a primary or primary runoff election and the sixty days prior to the date of a general or special election. 47 U.S.C. §315(b)(1). Similarly, in the NPRM to this proceeding, the FCC, too, acknowledged that "political advertising is important programming in that it provides information

[9] For example, the Commission suggests that "the logistics of distribution of commercials may also impose an economic burden that outweighs the benefits of requiring captions." R&O ¶152. This statement, which seemingly weighs the value of advertising against the logistics of distributing advertisements, fails to take

about candidates for public office, which is beneficial to persons with hearing disabilities as it is for all Americans." NPRM ¶80. For this very reason, we urge that political advertising not be exempt from the captioning mandates.[10]

The Commission asserts that video programming distributors receive many advertisements close to air time, and that monitoring the captioning of such commercials could be burdensome. R&O ¶152. In fact, however, captioning agencies have been very capable of preparing captions for thousands of advertisements each year, typically on a very expedited basis. Moreover, any difficulties with monitoring compliance is hardly sufficient reason not to require captioning in the first place. Video programming distributors can readily pass on the requirement to monitor compliance with this portion of the rules to the advertisers themselves.

For all of the above reasons, we strongly request reconsideration of the FCC's blanket exemption for all advertisers. A more limited exemption for advertisers, based on economic burden, would be appropriate, and consistent with the Congressional intent behind Section 713.

B. The Commission's Exemption for Late Night Programming is Overbroad

The Commission's final Order exempts all late night programming distributed between the hours of 2 a.m. and 6 a.m. 47 C.F.R.§79.1(d)(5). An exemption of this magnitude is excessive, as it represents as much as sixteen percent of all daily programming. Together with the five percent "*de minimis*" exemption, this results in an exemption of as much as twenty one percent of

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into account the strong societal interest in providing access to advertisements, discussed in the above line of Supreme Court cases.

[10] We renew the request contained in our comments to the NPRM that, at a minimum, the FCC require captioning by candidates in national elections, as well as in any election for which candidates receive local or federal government funding. NAD Comments at 16 (Feb. 28, 1996). These candidates should be well able to afford the $200 cost of captioning such advertising, or may apply for an undue burden exemption if they are unable to satisfy this requirement.

all daily video programming, notwithstanding the other exemptions granted by the Commission. Otherwise stated, only seventy nine percent of all new programming must be captioned under the final rules, before reaching the various additional exemptions contained in the final rules. We challenge this as violative of the legislative intent of Section 713 to achieve full video access for deaf and hard of hearing Americans.

As part of the late night programming exemption, the Commission has also ruled that programming providers are permitted to exempt programming service for any continuous four hour time period, beginning not earlier than 12 a.m. and ending not later than 7 a.m. In addition to our overall request for reconsideration to reduce the length of the late night programming exemption, we request reconsideration of this specific portion of this programming exemption. Expanding the hours for this exemption in this fashion is inconsistent with any basis upon which a late night programming exemption may be granted. Although the FCC states that an exemption between the hours of 2 a.m. and 6 a.m. is justified "based on the small size of the viewing audience," R&O ¶156, the same statement cannot be made with regard to programming shown between the hours of 12 a.m. to 2 a.m. and from 6 a.m. to 7 a.m. Many late night talk show programs and movies continue past the 12:00 a.m. time slot. In addition, it is quite customary for TV viewers to watch early morning news programs as early as 6 a.m. to begin their day. Accordingly, extension of the late night programming exemption in this fashion would be impermissible under Section 713.

C. The Exemption for Spanish Language Programming Should be Reversed

With the very narrow exception of news programs that can be captioned using electronic newsroom teleprompters, the FCC has all but exempted all foreign language programming from

its captioning mandates. 47 C.F.R.§79.1(d)(3). We request reconsideration of this decision to the extent that it affects captioning on Spanish language programming.

The FCC acknowledges that while the potential audience for programming in many foreign languages tends to be limited, the audience for Spanish language programming is quite large. R&O ¶147. Yet even the figures used by the FCC in its discussion on this point underestimate the actual number of individuals in the United States who speak Spanish. While the FCC estimates that there are 17,339,172 Spanish speaking individuals, in fact, it is predicted that by the year 2000, there will be 32 million Latino Americans living in the United States.[11] This will represent eleven percent of the total U.S. population and comprise the largest ethnic minority in our country. Even more impressive, is that this figure is expected to expand to 42 million by the year 2010, and is expected to continue growing at a considerably high rate thereafter.[12]

The FCC's decision to categorically exempt all Spanish language programming is somewhat surprising given the fact that Univision, the nation's premier Spanish language network, did not even ask for such a blanket exemption. Rather, Univision merely requested a longer phase-in period for Spanish language stations, noting that it "supports "the admirable goals behind closed captioning and [that it] will endeavor to provide this service to its audience." Comments of Univision at 1,4 (Feb. 28, 1997).[13]

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[11] Univision TV Notes, "U.S. Hispanic Market" at 1, citing Hispanic Consumer Market Report, DRI-McGraw-Hill, 1995.

[12] Id. Given the huge American viewership for such Spanish language programming, it is unlikely that a captioning requirement would result in a reduction of this type of programming, as suggested by some commenters. R&O ¶98.

[13] Univision further explained that future improvements in captioning technology resulting from the FCC's rulemaking would hopefully lower the costs of captioning "thereby making it possible for Spanish language stations to afford the necessary equipment and personnel." Comments of Univision at 5.

Notwithstanding this willingness to caption, the FCC rejects outright a mandate for foreign language captioning with the explanation that "the personnel and the facilities necessary to caption languages other than English are extremely limited and with respect to live captioning are almost entirely nonexistent." R&O ¶147. This assertion, however, is not entirely supported by the record. The FCC itself reports that one national captioning agency, VITAC, has confirmed that off-line Spanish captioning could be started within a matter of months. R&O ¶100. Similarly, comments submitted by WBGH to the FCC's NPRM in this proceeding established that many caption agencies already have non-English speaking captioners, and that at least one popular PBS Spanish instruction series, "Destinos" has already been closed captioned. Comments of WGBH at 9 (Feb. 28, 1997).

The FCC's Report also raises concerns about the logistical problems of captioning Spanish language programming because some of this programming is obtained from sources outside of the United States. R&O ¶147. In fact, however, captioning of programming from foreign countries is not without precedent. For example, public television stations regularly caption Masterpiece Theater, brought to this country from England. Indeed, just as PBS contracts with American based captioning agencies to caption such shows, so, too, can Univision, Telemundo, and other Spanish language stations arrange contracts for captioning of shows brought to their stations from foreign countries. Nor is it a problem that these foreign countries may not have the "technical system and standards for the distribution of such [captioned] materials." R&O ¶147. The FCC's

captioning obligations are placed on programming providers; the letter of the law does not require that the captioning take place in these foreign lands that may not have our captioning standards.[14]

Finally, the suggestion that the costs of non-English language captioning are higher than those for English captioning is simply not true. See R&O ¶98. While the costs of translating programs from English to Spanish may be higher, captioning agencies report that the costs of same language captioning are no different for Spanish than they are for English because the same character set, computers, and captioning skills are required for both types of captioning.

As noted in the NAD comments to the NPRM, individuals who have both a hearing disability and use a different primary language face a double barrier to accessing information in our nation. Given the high viewership of Spanish language programming and the fact that there is no legal justification for exempting captioning on such programming based on economic burden, we urge the FCC to reverse its decision to permanently exempt such programming from its captioning mandates. Rather, greater flexibility in the phase-in period for such captioning would be a narrow, and more suitable means of addressing the issues related to Spanish language programming.

IV. The FCC Should Establish Minimum Levels of Captioning for Live News Programs

Throughout this proceeding, various parties have urged the FCC to require real time

[14] The fact that much non-English language programming is imported from countries which do not have similar captioning mandates is insufficient reason for not requiring captioning on these shows. It is not uncommon for Congress or the FCC to impose requirements on products and services imported into the United States from countries that do not impose similar requirements. The requirements for wireline telephones to be hearing aid compatible, 47 U.S.C. §610, and for television sets larger than thirteen inches to have decoder circuitry, 47 U.S.C. §§303(u), 330(b), are two such examples.

captioning for live newscasts.[15] The need for live stenocaptioning of news programs is clear and undisputed: electronic newsroom reporting (ENR), commonly used to caption news shows, fails to provide for captioning of live interviews, field reports, sports and weather updates, school closings, and other late breaking stories which are not pre-scripted. As such, ENR does not fulfill the Congressional intent to provide *full access* to news programming for deaf and hard of hearing individuals.

The FCC acknowledges that ENR "is not the functional equivalent of the audio portion of the programming" contained in live newscasts, R&O ¶84, and further recognizes that "the ENR method does not provide complete captioning when not all aural portions of a program are scripted," R&O ¶73, citing NPRM at ¶21. Accordingly, the Commission urges programmers "to script additional portions of their programming, especially weather and sports reports," and to provide short descriptions of non-captioned segments, to fill the gaps currently presented by ENR. R&O ¶84. The NAD remains concerned that the Commission's "urging" may be insufficient to change programmer practices and to improve upon the critical shortcomings of ENR. Moreover, we remain concerned that the Commission's decision to indefinitely permit the use of ENR will continue to seriously impair access by deaf and hard of hearing Americans to vital information contained in live news and public affairs programming. As noted in our comments to the NPRM, ENR violates both the spirit and intent of Section 713 to make live programming fully accessible to caption viewers. NAD Comments at 27.

[15] Comments of NAD at 27 ; Comments of Captivision Comments at 11 (Feb. 28, 1997); Reply Comments of COR at 11 (Mar. 31, 1997).

The Commission raises concerns about the number of real-time captioners available to provide such captioning at the present time, and suggests that "it may be appropriate to reconsider the use of ENR as a means of captioning once the cost of real-time captioning declines, the availability of captioners increases, and the technology to provide live captioning from remote locations becomes more readily available." R&O ¶84. The Commission does not define when such a reconsideration would take place.

Unfortunately without a mandate for real time captioning in place, however, an increase in the number of real time captioners may not come about. Indeed, it is this very mandate that is needed to serve as an impetus for the court reporting field to train stenographers to provide real time captioning. Accordingly, we renew our request to require real time captioning of live news and public affairs programming after January 1, 2000. If such a mandate is in place, by that time the availability of stenocaptioners will increase, making real time captioning more feasible for those stations able to handle the costs of providing this type of captioning.[16] Indeed, it is the larger stations that handle more live (off-studio) programming for local news, and as such, require real time captioning to a greater extent. Yet is precisely these stations that would best be able to meet the costs of such captioning.

Until such time as real time captioning is required, we urge that the Commission require that a certain percentage of each live news program contain captions in order to comply with the legislative mandate for full video access. Specifically, we propose that video programming providers be required to ensure that 90 percent of each newscast be closed captioned. Finally, we

[16] Stations with smaller budgets could petition the FCC for permission to continue to use ENR for the captioning of news and public affairs programming.

urge the Commission to clarify that stations currently providing real time captioning must continue to do so, and may not revert to ENR at this late date. A rule of this kind would be consistent with the Commission's other rules prohibiting a reduction in the amount of captioning that is already provided, 47 C.F.R.§ 79.1(b)(3), and with Congress' goal to increase video access.

V. More Specific Parameters are Needed with Respect to Undue Burden Exemption Requests.

A. Captioning Should Continue Pending an Undue Burden Exemption Request.

The FCC has ruled that "[d]uring the pendency of an undue burden determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements." 47 C.F.R. §79.1(f)(11). This action not only violates the intent of Section 713; it is also inconsistent with prior FCC policy.[17] Indeed, what this rule does is to reverse the presumption that captioning is required, and impose a significant burden on the FCC or consumers to overcome that burden. Even more disturbing is that the FCC has placed no time limits on its undue burden determinations. The dire consequence is that programs may inexplicably remain uncaptioned for unduly long periods of time pending an undue burden decision. In order to avoid such an outcome, we urge the Commission to disallow exemptions pending undue burden determinations and to establish an outside limit on the time by which it must resolve undue burden exemption requests.

B. Undue Burden Exemptions Should be Limited in Time

The FCC has rejected the suggestion that it set a specific time limit on undue burden exemptions. The FCC has explained that "it is better to maintain the flexibility to limit the

[17] For example, the Commission prohibits cable operators from deleting the signal of a commercial television station pending a request to do so. 47 C.F.R.§76.59(c).

duration of an undue burden exemption if the facts . . . indicate that the particular circumstances of the petition warrant a limited exemption." R&O ¶205. In fact, however, virtually all petitions involve situations in which the circumstances warranting an exemption may change. The costs of captioning are likely to continue dropping, and the financial situation of a particular provider or producer may be altered over time. The circumstances that warranted an exemption at one point in time may no longer be applicable as little as a year or two later.[18] At the very least, recipients of such exemptions should be required to request a renewal of those exemptions within a given period of time - for example, annually - rather than have those exemptions continue indefinitely. To do otherwise is again placing a considerable burden on consumers, who will have the onerous task of monitoring providers to see if the continued exemption is warranted.

VI. The FCC's Process for Ensuring Captioning Compliance Needs Revision

The Commission's Order relies on consumer complaints as the primary means of monitoring and enforcing compliance with the closed captioning mandates. However, the lack of specific recordkeeping requirements, combined with the lengthy and confusing complaint procedures, as well as the Commission's *"de minimis"* rule, make effective enforcement of the closed captioning rules difficult, if not impossible, for consumers. The NAD urges the Commission to make the following changes to its final rule, in an effort to achieve effective compliance with its captioning mandates.

[18] Even a low budget educational station may unexpectedly receive an endowment that enables it to pay for captions.

A. The Commission Should Require Recordkeeping

Although the Commission relies on public complaints to ensure compliance with the captioning mandates, it has decided not to require entities covered by Section 713 to either keep, or make available to the public, records documenting that compliance. R&O ¶244. Without access to this information, however, members of the public will have virtually no way of knowing whether compliance by a particular distributor has been achieved. Indeed, the Commission's action in this docket is in marked contrast to rules requiring public reporting on the provision of children's educational and informational programming. 47 C.F.R. §73.3526(a)(8)(iii). Noting the importance of using reporting to "facilitate public monitoring and increase broadcaster accountability," the Commission has directed broadcasters to prepare reports, keep those reports on children's television programs separate from other sections of their public inspection files, and to make periodic on-the-air announcements regarding the existence and location of these reports.[19]

In the instant proceeding, the Commission defends its decision not to impose specific recordkeeping and reporting requirements because these requirements might impose a burden on video programming providers. R&O ¶244. Imposition of any burden is questionable, however, given the fact that these providers must keep records anyway in order to "defend against possible consumer complaints." Id. By comparison, without such a reporting requirement, the burden of monitoring compliance will shift to consumers, who will be saddled with constant monitoring to

[19] *Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations*, Report and Order, released Aug. 8, 1996 ¶65, 67 (*Children's Television*).

gauge a video programming distributor's performance. It is unreasonable to expect any consumer group with limited resources to handle so enormous a task.[20]

The NAD urges the Commission, as it has done for children's television programming, to adopt a standard closed captioning reporting form for use by all video programming distributors. The form, to be completed quarterly, should require identification of the station, the programs it airs to meet its captioning obligations for pre-rule and new programming, and the exemptions it has claimed. The maintenance of such information in public files and on the World Wide Web will provide critical information, without which effective enforcement of the rules will be nearly impossible.[21]

B. The Complaint Resolution Process is Time Consuming and Overly Burdensome

The final rule requires consumers to first file complaints with a video programming distributor before filing with the FCC. 47 C.F.R. 79.1(g)(1). The Commission has adopted this rule, notwithstanding the fact that it may be confusing, frustrating, and time-consuming for consumers to ascertain and locate the correct recipient for such complaints.[22] Indeed, the Commission rejected this very approach in its proceeding on children's educational programming. There, the Commission defended its decision not to require prior consumer contact with a licensee

[20] As noted above, the task of monitoring compliance is made even more difficult by the fact that stations are permitted an open-ended five percent "*de minimis*" exemption, under which captioning may be omitted from virtually any type of programming.

[21] Even more useful would be to have this information posted directly to the FCC's webpage. The FCC has taken similar steps to encourage broadcast licensees to post their children's television programming reports on its webpage. See http://dettifoss.fcc.gov:8080/prod/kidvid/prod/elecfile.htm.

[22] The FCC notes that a complaint may go to several entities, including a broadcast licensee, the entity responsible for the programming where the distributor does not exercise editorial control, or the distributor. R&O ¶242. Although the distributor is ultimately responsible for directing consumers to the proper respondent, misdirected complaints only delay the already lengthy complaint resolution process. Moreover, the rules are unclear with respect to the obligation of entities other than distributors - e.g., licensees - to re-direct complaints that have been erroneously filed with such entities.

because "such a requirement could be unduly burdensome to the public, prevent legitimate complaints from being heard, and deny the FCC an important source of information." *Children's Television* ¶143. Virtually identical problems exist here. Indeed, the difficulties likely to be encountered by consumers in this proceeding are further exacerbated by communication barriers frequently encountered by the rule's deaf and hard of hearing beneficiaries - barriers which may not even be present with respect to complaints about children's programming.

In addition to the difficulties discussed above, prior experience with a particular distributor may lead a consumer to conclude that the distributor is likely to be unresponsive to a consumer complaint. In such instances, consumers should have the option of bringing their complaints directly to the FCC. Indeed, this is permitted in the Commission's proceeding on pole attachments, wherein parties are permitted to file directly with the FCC without first contacting a respondent, so long as the complaint contains an explanation for why taking steps to resolve the problem prior to filing are believed to be "fruitless." 47 C.F.R.§1.1404(i). In this proceeding as well, the Commission should not force consumers to seek informal redress from a distributor if experience shows that going first to that distributor would be a waste of time.[23]

The Commission's final Order also allows video programming distributors to respond to complaints within forty-five days of the end of the quarter in which the complaint is alleged to

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[23] In its Comments on the NPRM, the NAD had proposed the establishment of a consumer council or coordination point to serve as a liaison between consumers and video distributors and to assist in resolving complaints. Comments of the NAD at 29. Should the FCC continue to reject this approach, we urge that, at a minimum, video programming distributors be required to designate a liaison for closed captioning, and to file the name and method of contacting that liaison with the FCC. The FCC imposed this very same requirement on licensees responsible for complying with its children's television rules, noting the "value in identifying for the public an individual to contact with concerns or complaints," and the fact that this would not only "facilitate public access to information" about a station's programming efforts, but also "assist such stations in responding to complaints." *Children's Television* ¶62. We also urge that the name and method of contacting such liaison be added to the FCC's web page.

have occurred or within forty-five days of the receipt of the complaint, whichever is later. 47 C.F.R. §79.1(g)(3). This is an inordinate amount of time, and will hinder effective enforcement of the Commission's captioning mandates. Indeed, under this rule, a consumer filing a complaint at the start of a quarter may have to wait as much as 135 days for a response to his or her submission. If, as the Commission suggests, distributors are to keep accurate records of their compliance, they should not need forty five days to investigate and address consumer complaints.

The Commission's decision to allow providers to wait until the end of the quarter is presumably based on the fact that compliance with the captioning schedules will be determined on a quarterly basis. However, a rule requiring an answer twenty days within the end of the quarter in which the complaint was submitted would be a more reasonable period of time for these respondents. Moreover, there is no reason to wait until the end of the quarter for complaints dealing with issues other than the amount of captioned programming. For example, video providers should be required to address complaints based on technical violations within twenty days of receipt.[24] The technical and operational problems presented by such complaints should not be tolerated for so extensive a time period as would be permitted under the final rule. Finally, all complaints concerning new programming which are filed *after* the eight year transition period should also receive responses within twenty days. If, as the 1996 Act requires, video programming providers will be required to caption 100% of new programming at the end of this period, there will no longer be a need to wait until the end of a quarter to prepare responses to

[24] These could include allegations that captions are not being delivered intact, are not synchronized with the video portion of the program, or end before the completion of the program. Additionally, there is no need to wait for the end of the quarter for complaints about previously captioned programs that have not been transmitted with captions, where reformatting has not occurred.

complaints on the amount of captioned programming.[25] If the submission of informal complaints to providers continues to be the first step in the complaint resolution process, the Commission should take pains to ensure that this initial step is not drawn out any longer than necessary.

VII. The FCC Should Take Action to Ensure Compliance with its Mandates for Pre-rule Programs

The Commission has mandated that 75% of all pre-rule programming, defined as programming first published or exhibited before the effective date of the Commission's captioning rules, be captioned by the first quarter of 2008. 47 C.F.R. 79.1(b)(2). However, the Commission has decided not to establish interim benchmarks for such programming, based on the assumption that "market forces will foster increased captioning of pre-rule programs." R&O ¶64.

It is important for the Commission to recognize that it was the failure of these very same market forces to respond to the demand for increased captioning of pre-rule programming that led Congress to require that video programmers "maximize" access to such programming through legislation. Although the FCC states that it will monitor distributors' efforts to increase the percentages of captioning on pre-rule programs, we remain concerned that without the obligations that providers monitor and pace themselves, compliance with this rule will be negligible over the next ten years. Accordingly, we request that the FCC reverse its decision not to require benchmarks that ensure a steady increase in captioning for pre-rule programming, and that, in accordance with our discussion above, providers be required to maintain public records tracking

[25] Because compliance with the pre-rule captioning mandates would continue to be measured on a quarterly basis after the ten year transition period for such programming, R&O ¶61, we propose that video providers continue to be given twenty days after receipt of the complaint or after the end of the quarter in which the complaint was filed, to respond to complaints on this type of programming.